

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 24TH DAY OF MARCH 2022 / 3RD CHAITHRA, 1944

WP(C) NO. 25453 OF 2021

PETITIONER/S:

SANTHOSH KUMAR K
AGED 53 YEARS
PROPRIETOR, M/S.SWATHI CONSTRUCTIONS, RAYIRANKANDATH HOUSE,
KOONATHARA, SHORNUR-679523.
BY ADVS.
T.M.SREEDHARAN (SR.)
NISHA JOHN
V.P.NARAYANAN

RESPONDENT/S:

- 1 THE COMMISSIONER
CENTRAL GST AND CENTRAL EXCISE, C.R.BUILDING, MANANCHIRA,
KOZHIKODE-673001.
- 2 THE CHIEF COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE,
THIRUVANANTHAPURAM ZONE, COCHIN-682018.
- 3 CUSTOMS,
EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTHERN BENCH,
1ST FLOOR, WTC BUILDING, FKCCI COMPLEX, K.G.ROAD,
BANGALORE-560009.
BY ADV SREELAL WARRIER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
14.03.2022, THE COURT ON 24.03.2022 DELIVERED THE FOLLOWING:

BECHU KURIAN THOMAS, J.

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W.P.(C)No.25453 of 2021

Dated this the 24th day of March, 2022

JUDGMENT

Petitioner seeks relief from the burden of making a pre-deposit under Section 86 of the Finance Act, 1994 ('for short 'the Act') for preferring the appeal before the Central Excise and Service Tax Appellate Tribunal (CESTAT).

2. Petitioner is a proprietor of an establishment by name M/s. Swathi Constructions at Shoranur and is engaged in laying of power lines on behalf of persons, who had executed contracts with the Power Grid Corporation of India.

3. According to the petitioner, it had executed job works during various financial years and that all records and details were submitted to the jurisdictional officers under the Goods and Service Tax Act, 2017 as well as the Central Excise Act 1944. He further contended that after the coming into force of the CGST Act, an order was issued on 13.5.2019 levying penalty and service tax upon the petitioner under five different heads, imposing a huge liability upon the petitioner. Though the

imposition of liability of service tax and penalty upon the petitioner was impermissible in the circumstances of the case, petitioner challenged the order of the Adjudicating Authority before the CESTAT. As per the provisions of Section 86 of the Finance Act, 1994 r/w Section 35F of the Central Excise Act, 1944, petitioner was bound to pay as pre-deposit an amount equivalent to 7.5% of the quantum of tax under dispute. It is contended that the pre-deposit payable as contemplated under law, in the instant case was Rs.18,06,057/- and that with all bonafides, petitioner deposited an amount of Rs.12,50,000/- leaving Rs.5,56,057/- as balance unpaid towards the pre-deposit. Since the petitioner found it financially impossible to make the balance of the mandatory pre-deposit, he has approached this Court seeking relief from such a pre-deposit. It is contended that the huge quantum of pre-deposit due from the petitioner is too onerous and makes it practically impossible for the petitioner to pursue its statutory remedy.

4. Learned Counsel for the petitioner relied upon the decisions in ***Diamond Entertainment Techno Pvt. Ltd. Vs. CGST, Dehradun [2019 368 ELT 579] (Delhi), [2016***

(340) ELT 63] (Delhi) to canvass the preposition that the jurisdiction under Article 226 can be invoked to grant relief against pre-deposit contemplated under Section 35F of the Central Excise Tax Act r/w Section 86 of the Finance Act.

5. The learned Counsel for the respondent Sri.Rajesh Raj, on the other hand contended that after the amendment in 2014 to Section 35F of the Central Excise Act 1944, the power to waive the mandatory pre-deposit is no longer available and in several decisions the Supreme Court has categorically held that the High Court should not interfere with the mandate of the Statute.

6. The amendment was in fact considered by the Delhi High Court in **[Dish TV India vs. Union of India and others in Manu/DE/1520/2020]** and it was held that in view of the amendment there is no question of any waiver of pre-deposit. It was also observed that time and again the Supreme Court has reminded the High Courts not to interfere with stipulations of mandatory pre-deposits.

7. On a consideration of the rival contentions, it is understood that the limited relief sought for by the petitioner is

to waive the mandatory pre-deposit of 7.5% required to institute an appeal before the CESTAT. When the pre-deposit required for preferring the appeal in the instant case was Rs.18,06,057/-, petitioner has already deposited Rs.12,15,000/- and the balance is only Rs.5,56,057/- which has not been deposited, since the petitioner claims to be in penury.

8. A perusal of the statutory provisions will reveal that the amendment to section 35F of the Central Excise Act r/w Section 86 of the Finance Act, 1994, clearly manifest the intention of the legislature that the waiver of pre-deposit, which was being resorted to, quite often by the courts of law, needed to be amended to make the pre-deposit mandatory. Thus, after the Amendment Act came into force, no discretion is available with the courts of law to waive the mandatory requirement of pre-deposit of 7.5% even if it is assumed to be onerous in the circumstances of the case. In the decision cited by the learned Counsel for the respondents ie. ***Dish TV India's case (supra)*** after considering the decisions of the Delhi High Court itself, the Division Bench of the said Court came to the conclusion that after the amendment, there is no question for

any waiver of pre-deposit, and that law does not permit such waiver. When the Statute does not provide for waiver of a pre-deposit, it is impermissible for this Court to act contrary to the legislative intention merely on the plea of financial hardships. If such pleas are entertained, and directions are issued for waiving the pre-deposit, there will be no end to such demands. Further if orders are issued, contrary to the Statute the same will destroy the very scheme of the Statute including the consequent amendment.

9. In this context, it is appropriate to refer to the decision of , the Supreme Court in ***Oil and Natural Gas Commission vs. Gujarat, [2017 (5) SCC 42***, wherein it was observed that the High courts cannot disregard the statutory mandates.

10. Even in the decisions cited by the learned Counsel for the petitioner in ***[Pioneer Corporation Vs. Union of India [2016 (340) ELT 63 Delhi]***, the observations of the court indicates that the interference with the statutory mandates after amendment, must be done only in very rare cases where a justification is made out for such an interference. Despite

observing as such, the court refuse to permit waiver of the pre-deposit in that case.

In view of the above, I find no merit in this writ petition and the same is dismissed. However, liberty is granted to the petitioner to make the balance of the pre-deposit within a period of one month from the date of a receipt of a copy of this judgment. If the said payment is made and the appeal is otherwise in accordance with law, necessarily the Tribunal will consider and dispose of the appeal on merits.

The writ petition is dismissed.

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BECHU KURIAN THOMAS
JUDGE

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APPENDIX OF WP(C) 25453/2021

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE SHOW CAUSE NOTICE DATED 20.04.2018 ISSUED BY THE COMMISSIONER OF CENTRAL GST AND CENTRAL EXCISE, KOZHIKODE.
- Exhibit P2 TRUE COPY OF THE ORDER-IN-ORIGINAL DATED 13.05.2019 PASSED BY COMMISSIONER OF CENTRAL GST AND CENTRAL EXCISE, KOZHIKODE.
- Exhibit P3 TRUE COPY OF MEMORANDUM OF APPEAL DATED 13.08.2019 SUBMITTED BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL.
- Exhibit P4 TRUE COPY OF THE HEARING NOTICE DATED 21.08.2020 ISSUED BY THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, BANGALORE.
- Exhibit P5 TRUE COPY OF THE SUBMISSION MADE BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, BANGALORE DATED 10.11.2011.
- Exhibit P5(A) TRUE COPY OF THE FINAL ORDER NOS.51852-51855/2021 OF CESTAT, NEW DELHI DATED 05.10.2021 IN M/S VIVEK CONSTRUCTIONS AND OTHERS VS. COMMISSIONER OF CENTRAL EXCISE AND CENTRAL GOODS AND SERVICES TAX, RAJASTHAN.
- Exhibit P5(B) TRUE COPY OF NOTIFICATION NO.45/2010 DATED 20.07.2020 ISSUED BY MINISTRY OF FINANCE, DEPARTMENT OF FINANCE, NEW DELHI DATED 20.07.2010.